No. 87-416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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Respondents do not contest the fundamental principle that a court without Article III power has no power to issue and enforce a judicial subpoena. Yet they argue that a district court need not consider its power to issue and enforce a subpoena before exercising it. Respondents also concede that a contempt judgment against a nonparty is generally appealable. Yet they argue that the court of appeals need not consider what would ordinarily be the threshold issue on such an appeal—whether the district court had Article III power to enter the judgment.

Respondents' effort to avoid the issue of Article III power in this case is understandable, but unavailing. It flies in the face of this Court's pronouncements about the appealability of contempt orders and the obligation of all federal courts to satisfy themselves of their power to act.

Respondents' effort to avoid the controlling force of *Allen* v. *Wright*, 468 U.S. 737 (1984), *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982), and *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), is also unavailing. Those decisions completely foreclose the respondents' claims of standing, and establish that the district court in this case was without Article III power.

I. THE DISTRICT COURT'S ARTICLE III POWER IS PROPERLY AT ISSUE

A. Article III Power Is Required To Enforce A Judicial Subpoena

Respondents largely ignore the initial question presented by this case—whether the judicial subpoena and contempt powers are limited by Article III. The court of appeals recognized that if subject matter jurisdiction, or Article III power, is necessary to support a judicial subpoena, then a "witness would have standing" to challenge the court's power or jurisdiction. Pet. A. 12a.

The court of appeals held, however, that a court's "lack of subject matter jurisdiction does not disable a district court" from issuing and enforcing subpoenas addressed to the merits of a suit. Pet. A. 12a. In their opening brief, USCC/NCCB noted the sharp conflict between that view and this Court's statement in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642 (1950), that the "judicial subpoena power . . . is subject to" the limitations of Article III. See Brief for Petitioners ("Br. Pet.") 14. In the absence of a case or controversy under Article III, USCC/NCCB argued, a district court is without judicial power to issue a subpoena or to compel compliance through civil contempt.[1]

[1] USCC/NCCB have acknowledged that the necessity of deciding jurisdiction justifies subpoenas designed to secure information relevant to jurisdiction. Br. Pet. 13, 19. But respondents have made no claim that the subpoenas here related to jurisdiction.

Respondents do not even cite *Morton Salt*, much less take issue with USCC/NCCB's argument. In fact, respondents now appear to concede the point. In their only reference to the question whether Article III power is required to enforce a subpoena, they state:

> Petitioners argue that appellate review must be available, . . . because *a court without jurisdiction has no power to enforce a subpoena.* But this argument is a non sequitur. That a court without jurisdiction lacks judicial power *may be a truism*, but it says nothing at all about if, when or by whom a trial court's decisions are appealable." Br. Resp. 37 (emphasis added).

Respondents' apparent position is that even though a court without Article III power lacks power to issue and enforce a judicial subpoena, the recipient of such a subpoena may not raise the issue of judicial power in the district court or on appeal from a contempt judgment. That contention is insubstantial.

B. Witnesses May Challenge The District Court's Article III Power To Subpoena Them And Hold Them In Contempt

Having conceded, implicitly if not explicitly, that a court without Article III power cannot issue and enforce a subpoena, respondents are hard-pressed to explain why a witness may not challenge a subpoena as beyond the issuing court's Article III power. A subpoena may be challenged on the ground that it is "unduly burdensome or *otherwise unlawful*," *United States* v. *Ryan*, 402 U.S. 530, 532 (1971) (emphasis added), and a subpoena that is beyond the power of the court is both "unlawful" and "*unduly* burdensome." See *In re Sealed Case*, 827 F.2d 776, 778 (D.C. Cir. 1987); see also Fed. R. Civ. P. 12(h)(3); 45(b)(1), (f).

In support of their argument that a witness may not contest the court's Article III power to issue a subpoena, respondents cite one case—*Blair* v. *United States*, 250 U.S. 273 (1919). As explained in our initial brief, how-

ever, *Blair* did not even address the judicial subpoena power conferred by Article III. See Br. Pet. 25-26.

Respondents essentially ignore most of the cases establishing the right of a contemnor to attack a contempt judgment on the ground that the order violated was beyond the court's jurisdiction. See Br. Pet. 15-19. They attempt to distinguish *United States* v. *United Mine Workers*, 330 U.S. 258, 295 (1947), by arguing that the jurisdictional challenge in that case was to the court's power to issue a particular kind of order, not to its power to entertain the suit. But in at least two cases cited by USCC/NCCB, *In re Burrus*, 136 U.S. 586 (1890), and *In re Sawyer*, 124 U.S. 200 (1888), the jurisdictional defect was that the court had no jurisdiction over the underlying suit.[2] And in *United Mine Workers* itself, the Court stated unequivocally that civil contempt orders will be vacated if the order that was disobeyed was "erroneously issued" or "beyond the jurisdiction of the court." 330 U.S. at 295. Any order entered in a suit that is beyond the court's Article III power is itself "beyond the jurisdiction of the court." Thus, in upholding the contempt judgments in *United Mine Workers*, the Court emphasized that "the subject matter of the suit, as well as the parties, was properly before the court," and "the elements of federal jurisdiction were clearly shown." 330 U.S. at 294; see also *id.* at 293.[3]

[2] Respondents dismiss those cases as involving orders that were not interlocutory. Br. Resp. 48n. 23. But the contempt order in this case was not interlocutory. *See* pp. 5-6, *infra*. The cases, in any event, were not cited on the issue of appealability. They were cited for the proposition that an alleged contemnor may defend against a contempt charge on the ground that the court lacks jurisdiction over the case in which the underlying order is issued.

[3] Respondents attempt to blunt the force of *United Mine Workers* by noting that the district court in this case has ordered any fine paid to the Treasury, not to them. But *United Mine Workers* did not hold simply that a litigant may not profit financially from a civil contempt order entered without jurisdiction. A litigant who fails to present a case or controversy under Article III is not entitled to any of the benefits of a civil contempt order—including its coercive effect upon the witness. In fact, *United Mine Workers* makes clear that not even criminal contempt can survive a subsequent determination that jurisdiction was lacking, unless the underlying order was entered to facilitate a decision on jurisdiction

C. The Court Of Appeals Was Obligated To Consider The District Court's Article III Power

1. *This Is Not an Interlocutory Appeal*

The principal thrust of the respondents' position is that the appellate courts in this case have no occasion to consider the district court's Article III power because, as they put it, there is "simply nothing here to be appealed." Br. Resp. 38. The appeal is interlocutory, they contend, because it raises an issue—the court's Article III power—that had also been raised on a motion to dismiss. In respondents' view, this appeal is "in substance . . . indistinguishable from a direct appeal of the District Court's denial of the government's motion to dismiss." Br. Resp. 39.

Of course, if these characterizations of the appeal were accurate—if the appeal were truly interlocutory—then it should have been dismissed. But both the court of appeals majority and the respondents agree that the appeal had to be entertained to the extent of determining that "colorable jurisdiction" existed in the district court. See Br. Resp. 55-61. Thus, despite their rhetoric, respondents implicitly recognize that this is not an interlocutory appeal.[4]

The fact is that, for purposes of this appeal, the district court has not denied a motion to dismiss; it has entered a *judgment* of contempt and ordered two nonparties to pay daily fines totalling $100,000. That judgment was final and, as the respondents necessarily concede, Br. Resp. 54, immediately appealable. See, *e.g.*, *United States* v. *Ryan*, *supra*; *Cobbledick* v. *United*

[4] Respondents conceded in the court of appeals that the appeal was not interlocutory. Brief of Plaintiff-Appellees 16-17.

States, 309 U.S. 323, 328 (1940). When a contempt judgment is entered against a nonparty, there is nothing left for him to litigate in the district court.

> This power to punish [for contempt] being exercised the matter becomes personal to the witness and a *judgment as to him.* Prior to that the proceedings are interlocutory in the original suit.

Alexander v. *United States*, 201 U.S. 117, 122 (1906) (emphasis added). Thus, when a witness is held in contempt, his "situation becomes so severed from the main proceeding as to permit an appeal." *Cobbledick* v. *United States*, 309 U.S. at 328. Not to allow an immediate appeal would, as a practical matter, "forever preclude review." *Ibid.*

2. *Appellate Courts Must Consider Jurisdictional Defects in Appealable Orders*

A civil contempt order, like any final order, may be attacked on appeal on the same grounds upon which it may be resisted in the district court—including the ground that the district court lacked Article III power to act. Respondents disagree. They argue that a contempt order, although "generally appealable," Br. Resp. 54, may not be appealed on the ground that the order was beyond the district court's Article III power, because the parties to the underlying lawsuit may (and in this case did) challenge the court's Article III power. But no issue is more fundamental than Article III power, and it would be strange indeed to allow an appeal from a contempt order, but not on the ground that the district court was without judicial power to enter it. A witness held in contempt is entitled to a "full review of his claims," *United States* v. *Ryan*, 402 U.S. at 533, and that "full review" necessarily embraces any claim that the district court exceeded the constitutional limitations on its judicial power. Indeed, once an appeal is properly taken, the appellate court "has a special obligation 'to satisfy itself not only of its own jurisdiction, but also that of the lower court[].'" *Bender* v. *Williamsport Area School*

Dist., 475 U.S. 534, 541 (1986) (quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934)).

Respondents insist that "*Bender* does not establish the automatic appealability of any challenge to the jurisdiction of a district court." Br. Resp. 44. Of course it doesn't, and USCC/NCCB have never said that it does. The denial of a party's motion to dismiss for lack of jurisdiction is not immediately appealable. Jurisdictional issues, like other issues, may be presented to the court of appeals only on review of an appealable order. But when, as in this case, there is an appealable order, that order may certainly be attacked on appeal on the ground that the district court lacked judicial power to enter it.

In arguing to the contrary, respondents invoke *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But that case did not involve an appeal from a final judgment of contempt against a nonparty, and it does not support the proposition that the district court's jurisdiction is immune from scrutiny on such an appeal. *Cohen* held that in limited circumstances a *party* has a right to appeal certain orders, *otherwise interlocutory*, that "finally determine claims of right separable from, and collateral to, rights asserted in the action." 337 U.S. at 546. It did not hold that a contempt judgment against a *nonparty*, *otherwise appealable*, becomes nonfinal and nonappealable if the witness's defense happens to coincide with a claim that may be made by a party.[5] *Cohen*

[5] There is no case of which we are aware that holds, or even remotely suggests, that there are any limits on the right of a nonparty contemnor to raise on appeal any challenge that affects the validity of the contempt order—either because the challenge resembles an argument that may be made by a party, or for any other reason. Indeed, in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981), this Court indicated that a contempt order is directly appealable without regard to whether the issues raised meet the test of *Cohen*. Of course, contentions going to the merits of the lawsuit—for example, failure to state a claim—will not generally affect the validity of a subpoena or contempt order. But the fact that a nonparty contemnor might seek to raise an irrelevant argument does not render his appeal interlocutory.

certainly did not hold that when an appeal is taken by a nonparty from a contempt judgment, as it unquestionably may be, the appellate court is disabled from considering the threshold question on any appeal—whether the district court had jurisdiction to enter the challenged order. Such a result would be flatly contrary to *Bender* and the numerous other decisions upon which it relies.

3. *There Are No Practical Reasons To Decline To Consider Jurisdiction*

Respondents protest that allowing a nonparty witness to attack the jurisdictional basis of a contempt order on appeal would lead to intolerable delays in litigation. But USCC/NCCB do not seek to establish any new appellate rights in this case. It has been established law at least since 1906 that contempt orders against nonparties may be appealed. See *Nelson* v. *United States*, 201 U.S. 92 (1906); *Alexander* v. *United States*, 201 U.S. 117 (1906). And the fact is that an appeal of a contempt order against a nonparty "does not interfere with the orderly progress of the main case." *International Business Machines Corp.* v. *United States*, 493 F.2d 112, 115 n.1 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). The main case may proceed simultaneously with the appeal, and a stay of the civil contempt order need not be granted if such a stay would unduly delay the main case.

This Court, in any event, has expressly rejected the suggestion that a nonparty's right to appeal a contempt order should be denied because it "may involve an interruption of the trial or of the investigation." *Cobbledick* v. *United States*, 309 U.S. at 328. As the Court explained, "not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or [accept the continuing burdens of contempt]." *Ibid.*[6]

[6] Thus, unless USCC/NCCB may raise their constitutional challenge to the district court's contempt order on this appeal, they will be forced to choose between abandoning the claim altogether or allowing the $100,000 daily fine to accumulate indefinitely. Allowing them to raise their challenge to the contempt order in conjunction with an appeal on the merits in the underlying suit would be a hollow gesture. There may never be any appeal in the underlying action, and if there is it may be years from now. As nonparties, the USCC/NCCB have no control whatsoever over the course of the underlying action. They cannot expedite the case, nor can they take steps to ensure that there is an adjudication between the parties that would permit an appeal.

Respondents argue, however, that allowing a witness held in contempt to challenge the court's Article III power on appeal would invite collusion: a party could circumvent the rule against interlocutory appeals, they contend, by subpoenaing a friendly witness willing to place himself in contempt. But the fear of collusion is far removed from this case. These subpoenas were issued at the request of the plaintiffs, not a defendant seeking to establish the court's lack of jurisdiction. And they were served upon anything but a friendly witness. The district court, in any event, has more than adequate power to deal with parties who engage in collusive and sham maneuvers. It can deny a stay of contempt sanctions pending appeal, and it can impose additional sanctions under Rules 11 and 26(g) of the Federal Rules of Civil Procedure.[7]

[7] This is not a case like *Washington* v. *Standard Oil Co.*, 747 F.2d 1303, 1305 (9th Cir.), *cert. denied*, 471 U.S. 1100 (1984), in which a nonparty has such a "congruence of interests" with a party that a contempt order against the nonparty "may not be severed from the primary action or treated as final." In that case, a state's Attorney General was held in civil contempt based on the state's noncompliance with an order issued to it as a party. The court found a "congruence of interest between [the Attorney General] and the state" for two reasons: (1) the state would pay the cost of all sanctions, and the Attorney General was therefore not "directly at risk"; and (2) the Attorney General "control[led] the strategy and tactics of the suit" for the state, including the decision whether to resist a discovery order. 747 F.2d at 1306. Here, by contrast, the government has not agreed to pay any fine against USCC/NCCB, and neither the government nor USCC/NCCB is employed by, much less controlled by, the other. The mere fact that they agree upon the court's lack of Article III power does not establish that their interests in this case are identical. In fact, if the plaintiffs were

In sum, the principles that a nonparty may appeal a contempt order, and that an appellate court presented with such an appeal must consider the power of the district court to act, are firmly established. The issue that cannot be avoided on this appeal, then, is whether the district court had Article III power—more specifically, whether the respondents had standing.

II. THE RESPONDENTS LACK STANDING

Respondents' complaint in this case is that the Secretary of the Treasury and the Commissioner of Internal Revenue "have done nothing to enforce the law" against the Catholic Church. Br. Resp. 9; JA 13-14, ¶ 32; see also JA 10, ¶ 20. But "the interest in the just administration of the laws, including the interest in nondiscriminatory criminal enforcement, is presumptively deemed nonjusticiable *even if invoked by persons with something beyond a generalized bystander's concern;* only if the litigant is immediately affected as a target of enforcement can that presumption be overcome." L. Tribe, *American Constitutional Law* § 3-16, at 124 (1988) (emphasis added) (citing *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), and *O'Shea* v. *Littleton*, 414 U.S. 488 (1974)).

This principle is "[not] a doctrinal quirk unique to the field of criminal law administration." *Ibid.* It applies equally to the enforcement of the tax code. This Court's decisions "'suggest[] that litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges.'" *Allen* v. *Wright*, 468 U.S. at 748-49 (quoting *Wright* v. *Regan*, 656 F.2d 820, 828 (D.C. Cir. 1981)). Implicitly recognizing the heavy burden they face in establishing their standing to challenge someone else's tax status, respondents labor mightily to describe some personal injury to themselves. But that effort fails, in large part for two reasons.

First, they do not allege that the IRS has ever done anything to them: they have not been denied tax exemptions or threatened or challenged in any way by the IRS. As a result, a judgment against the IRS will not relieve any burden, or confer any benefit, upon the respondents.

Second, respondents concede, implicitly if not explicitly, that it is speculative to say that the Catholic Church and its members would alter their alleged political activities in any way if the IRS were ordered to take enforcement action against them. As a result, the respondents are unable to say that their ability to communicate their message, much less elect their candidates, will be enhanced *even indirectly* if the relief they seek is granted. All they can say is that a judgment in their favor would impose an economic burden on the Catholic Church or its members, and that is simply not enough to establish standing.

A. The Clergy Respondents Lack Standing

In *Valley Forge* this Court rejected the notion "that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege '"distinct and palpable injury to himself," . . . that is likely to be redressed if the requested relief is granted.'" 454 U.S. at 488 (citations omitted). Thus, while a "spiritual stake" may be the basis for a claim of injury, it will not suffice to confer standing, any more than an economic or other interest, if it is "'abstract' or 'conjectural' or 'hypothetical.'" *Allen* v. *Wright*, 468 U.S. at 751. Spiritual injury will support the standing of those "'who are *directly affected by the laws and practices against which their complaints are directed.*'" *Valley Forge*, 454 U.S. at 487 n. 22 (quoting *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963)) (emphasis added).

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to prevail in this case, USCC/NCCB and/or related entities and contributors may have to pay substantial sums of money to the government.

Respondents, however, "*do not complain of* [*government*] *action specifically directed against them.*" Br. Resp. 69 (emphasis added). Instead, like the plaintiffs in *Valley Forge*, respondents claim that an Establishment Clause violation necessarily injures those who are not members of a religious group that has allegedly received an impermissible benefit. As they put it, "governmental endorsement or discrimination . . . necessarily denigrates the beliefs of those who disagree with the official preferred religion." Br. Resp. 71. As explained in our initial brief, however, there is no basis for any claim of denigration in this case—indeed, there is no such claim in the amended complaint. See Br. Pet. 31-33. Catholicism has not been announced as the "official preferred religion," Br. Resp. 71,[8] nor have the clergy respondents' religions been denounced as inferior. What the government has done—or, more precisely, not done—is neutral on its face and denigrating to no one.

Moreover, even if the respondents could allege some factual basis for a claim of denigration or stigma, they "do not allege a stigmatic injury suffered *as a direct result of having personally been denied equal treatment.*" *Allen* v. *Wright*, 468 U.S. at 755 (emphasis added). See Br. Pet. 33-35. Accepting that standard, respondents argue in their brief that they have "personally . . . been subjected to discrimination as a result of the government's policy." Br. Resp. 80. But that argument is belied by their concession that they "do not complain of [government] action specifically directed against them." Br. Resp. 69. The undisputed facts are that none of the clergy respondents has sought and been denied a tax exemption; none has had a tax exemption revoked; none has been threatened with enforcement action of any

[8] In *Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970), this Court noted that "[t]he grant of a tax exemption [to a church] is not sponsorship" and "[t]here is no genuine nexus between tax exemption and establishment of religion."

kind. In fact, other than the granting of tax exemptions to some of the plaintiffs, none of them has alleged any contact with the IRS at all.[9]

The clergy plaintiffs thus stand in a very different posture from the plaintiffs in *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), and *Heckler* v. *Mathews*, 465 U.S. 728 (1984). In each of those cases, the plaintiff claimed that he was denied a benefit that was conferred upon others. Here, by contrast, the respondents have been denied no benefit. In fact, their allegation that the Catholic Church is receiving preferential treatment rests entirely upon their *assumption*—unsupported by any alleged facts—that the government *would* treat them differently from the Catholic Church *if* they behaved as they say the Catholic Church has.[10] Such an assumption is not a well-pleaded fact, and need not—indeed, must not—be assumed to be true. The allegation is entirely "conjectural" and "hypothetical." *Allen* v. *Wright*, 468 U.S. at 751.[11]

[9] In their brief, respondents refer to just one case in which the IRS allegedly suspended or withdrew a tax exemption because of a violation of § 501(c)(3)'s limitation on political activities. Br. Resp. 17-18. That case arose 24 years ago and did not involve any of the respondents.

[10] Respondents state in their brief that "[t]he IRS has allowed Catholic clergy to electioneer . . . in ways that are forbidden to the clergy respondents," and that it has "refus[ed] to permit the clergy respondents . . . to employ the same techniques" as Catholic clergy. Br. Resp. 75, 79. But there is no allegation in the complaint or in the affidavits that the clergy respondents have ever attempted to engage in any activity Catholic clergy are alleged to have engaged in, much less that the IRS has ever taken or threatened action against them, or even instructed them not to engage in such activities. The clergy respondents have not even inquired about their right to engage in such activities—or, for that matter, complained to the IRS that Catholic clergy have been permitted to engage in activities they consider to be impermissible. The amended complaint simply alleges, "[u]pon information and belief," that "*other* citizens and taxpayers" have informed the IRS of the Church's allegedly illegal activities. JA 13, ¶ 31 (emphasis added).

[11] The fact that "direct governmental coercion is not a necessary element of a violation of the Establishment Clause," Br. Resp. 71,

The claim of the clergy respondents here is in essence the same as the claim rejected in *Valley Forge*—that they have witnessed the conferral of a benefit upon a church to which they do not belong, and with which they disagree. Because they are clergy, they may feel more intensely about the matter than others, and may object with greater fervor. But "standing is not measured by the intensity of the litigant's interests or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. The clergy respondents are, therefore, without standing.

B. The Respondents Lack Voter Or Citizen Standing

In their amended complaint, respondents alleged that the IRS's lack of enforcement action "impairs and diminishes plaintiffs' right to vote." JA 17, ¶ 48(b). And in their brief, respondents cite decisions of this Court

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does not mean that distinct and palpable personal injury is not required to establish standing. As the Court recognized in *Valley Forge*, there may be some violations of law, in the Establishment Clause area as well as in others, that no one has standing to challenge. 454 U.S. at 488-90. In cases in which the Court has recognized standing to complain of an alleged Establishment Clause violation, the plaintiff has suffered "'distinct and palpable injury to himself.'" *Id.* at 488 (citations omitted). See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, 107 S. Ct. 2862 (1987) (employee allegedly victimized by religious discrimination); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985) (employer required by statute to grant employees Sabbath leave); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985) (children subjected to religious exercise); *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (legislator subjected to legislative Chaplain's prayers); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (restaurant denied liquor license); *Larson* v. *Valente*, 456 U.S. 228 (1982) (church required to register and report fundraising efforts); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (public school teacher forbidden to teach evolution); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963) (schoolchildren subjected to Bible reading); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (schoolchildren subjected to prayer); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (candidate for office required to affirm faith in God); *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (retail clerks convicted of doing business on Sunday).

establishing that voters have standing to challenge government action that abridges their right to *vote* or dilutes the strength of their *votes*.[12] But the respondents' brief, as well as the affidavits and the factual allegations of the complaint, makes clear that they have no claim that their right to *vote* has been impaired. Instead, they claim distortion of the pre-electoral political process. But that claim is itself belied by the respondents' steadfast refusal to allege, or even argue, that enforcement action by the IRS would affect the level or nature of the religiously motivated political activity allegedly engaged in by the Catholic Church and its members. "*It is irrelevant*," they repeat, "*whether the Church will continue to be active politically or if its members will increase their donations*" as a result of any enforcement action. Br. Resp. 90.

But if respondents do not claim that the Catholic Church and its members will alter their alleged political conduct as a result of a judgment—much less that election results will be affected—then what redressable injury do they claim? Respondents argue that "the government permits the Catholic Church . . . to use the power and prestige arising from the Church's standing in the community to partisan advantage." Br. Resp. 88. If, however, enforcement action by the IRS will not alter the Church's alleged political conduct, then whatever "partisan advantage" the Church has enjoyed is neither fairly traceable to the government's conduct nor likely to be redressed by a judgment.

Respondents also argue that "[t]he government's actions make it much more expensive for respondents to donate money to political campaigns . . . as compared to campaign contributors with Catholic Church backing,"

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[12] *McMichael* v. *County of Napa*, 709 F.2d 1268 (9th Cir. 1983), also involved dilution of the plaintiff's vote.

and that "[c]andidates backed by the Church . . . can raise funds more easily than . . . the candidates they [respondents] support." Br. Resp. 87, 88. This argument, however, is without a factual basis in the complaint, for the complaint does not allege that the Catholic Church has given money to candidates.[13] In any event, respondents cannot base their standing on any alleged difficulty candidates may have in raising money, because none of the respondents is a candidate for office.[14] Nor can respondents claim concrete injury as campaign contributors. Their political contributions will cost them the same whether or not the IRS takes enforcement action against the Catholic Church. And if the allegation is simply that the government has conferred an improper financial benefit on the Catholic Church and its contributors, then the claim is indistinguishable from the claim of standing rejected in *Valley Forge*.

The respondents' real claim in this case is that they have standing merely because the government has allegedly violated the law by failing to revoke the tax exemption enjoyed by their perceived ideological adversary, regardless of whether revocation of the exemption would alter their adversary's conduct or improve their own position in any way. They claim that their indifference to what may occur as a result of enforcement action by the IRS distinguishes their position from that of the plaintiffs in *Allen* v. *Wright*. In *Allen*, respondents

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[13] The brief contains the assertion that "Catholic priests . . . are allowed by the IRS to funnel Church funds to, or to solicit tax-deductible donations for candidates they support." Br. Resp. 78. But the complaint contains no such allegation. The complaint alleges instead, "upon information and belief," that dioceses have contributed money to "right-to-life" groups that have, "directly or indirectly, supported" anti-abortion candidates. JA 13, ¶ 27.

[14] One of the respondents, Karen DeCrow, ran for Mayor of Syracuse in 1969, but she is not now a candidate for anything and has no concrete plans to run for anything in the future. See JA 63.

argue, the "plaintiffs' injury was the diminished ability to obtain for their children racially integrated schooling," Br. Resp. 91—an injury that could not be shown to have been caused by the government. But the Court in *Allen* addressed another claim, which is indistinguishable from the claim now asserted by the respondents in this case—namely, "a claim simply to have the Government avoid the violation of law alleged in respondents' complaint." *Allen*, 468 U.S. at 753-54. As the Court noted, "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Id.* at 754.

The claim does not gain substance by calling the government's allegedly illegal conduct a "distortion of the political process." Br. Resp. 87. Since the respondents do not argue that the Catholic Church's alleged political activity would be altered in any way as a result of the enforcement action they seek, it is difficult to see what "distortion" is alleged to have occurred. But apart from that defect, the argument fails because it entirely eliminates the requirement that a plaintiff show "distinct and palpable injury to himself." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

Respondents' argument would permit citizen standing to challenge a broad range of governmental activity based on the mere allegation that the alleged illegality had distorted some process in which the citizenry has an interest. In *Allen* itself, the plaintiffs could have alleged that by conferring an unlawful tax exemption on segregated schools, the government had distorted the important process of integration. In *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the plaintiffs could have stated explicitly, as they did implicitly, that allowing Military Reservists to sit in Congress had distorted the legislative process. See Br. Pet. 37-38. In *United States* v. *Richardson*, 418 U.S. 166 (1974), the plaintiffs could have alleged that the government's re-

fusal to make public the CIA's budget distorted the democratic process by which citizens control the operation of government. In *Ex parte Levitt*, 302 U.S. 633 (1937), the plaintiff could have asserted that allowing Hugo Black to sit on the Supreme Court distorted the Court's decisionmaking process. In *Winpisinger* v. *Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the plaintiffs challenging the Carter administration's use of federal funds to promote the President's renomination could have established standing by using precisely the same formulation of alleged injury as the one employed here—a "distortion of the political process." [15] In virtually every case involving the Federal Election Commission, a citizen could also complain that governmental action has distorted the electoral process.

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[15] *Common Cause* v. *Bolger*, 512 F. Supp. 26 (D.D.C. 1980), is indistinguishable from *Winpisinger*. In both cases, the plaintiffs complained of an incumbent's ability to use federal resources to subsidize his campaign. As discussed in our initial brief, at 40-41, the court of appeals in *Winpisinger* held that the "dilution" of the challenger's efforts caused by the incumbent's use of government resources was not sufficient to confer standing. In *Bolger*, the district court concluded that it was. USCC/NCCB submit that *Winpisinger* was correct and *Bolger* was incorrect. See also *Shakman* v. *Dunne*, 829 F.2d 1387, 1397-98 (7th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3569 (1988). Both cases, however, presented stronger claims of standing than this case. First, the plaintiffs in those cases included candidates who complained that their chances of being elected were adversely affected by the challenged practices. Second, those plaintiffs could complain of unequal treatment—the incumbents had access to direct government financial support to which they could not possibly have had access. Here, by contrast, the respondents can only *assume* that they *would* be treated differently *if* they were to do what they say the Church has done. Third, in those cases a judgment in the plaintiffs' favor would have eliminated a source of funding for the plaintiffs' opponents. Here, by contrast, it is entirely speculative whether a judgment in the respondents' favor would reduce the "religiously compelled" contributions of Catholics, JA 16, 56-58, or, more importantly, the religiously motivated activity allegedly engaged in by the Church.

Such claims do not confer standing, any more than the claims of the citizen plaintiffs in this case.

In the final analysis, the respondents in this case claim nothing more than a "shared individuated right" to a government that does not establish religion and that enforces the tax laws according to their priorities. *Valley Forge*, 454 U.S. at 482. That claim is insufficient to support standing. It is "too abstract to constitute a 'case or controversy'" under Article III. *Schlesinger* v. *Reservists Committee*, 418 U.S. at 227; see *Allen*, 468 U.S. at 754-55; *Valley Forge*, 454 U.S. at 482-85. It is, at most, "a 'generalized grievance' shared in substantially equal measure by . . . a large class of citizens." *Warth* v. *Seldin*, 422 U.S. at 499. And since the claim is that law enforcement action should be initiated, it is "more appropriately addressed" in the executive branch, *Allen*, 468 U.S. at 751, which has the constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3."

CONCLUSION

The judgment of civil contempt should be reversed.

Respectfully submitted,

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